

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

CHICAGO MERCANTILE EXCHANGE INC.,	)	Docket No. 18 C 1376
Plaintiff,	)	
vs.	)	
ICE CLEAR US, INC., et al.,	)	Chicago, Illinois
Defendants.	)	August 10, 2020
	)	9:55 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

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1 (The following proceedings were had telephonically:)

2 THE CLERK: Case 18 C 1376, Chicago Mercantile  
3 Exchange v. ICE Clear.

4 THE COURT: Can the lawyer for the plaintiff  
5 please -- lawyer or -- well, let's do it this way. Can a  
6 lawyer for the plaintiff give the names of everyone on the  
7 phone.

8 MR. KUCALA: Sure, your Honor. This is Joe Kucala on  
9 behalf of CME, along with Joe Norvell and Tom Monagan from  
10 Norvell IP, and Matthew Kelly and Greg Skony from CME.

11 THE COURT: Okay. And somebody give the names of  
12 everybody who is on for the defendant.

13 MS. DURHAM: Yes, good morning, your Honor. This is  
14 Gina Durham on behalf of ICE from DLA. I have with me Paul  
15 Taufer, Josh Schwartzman, and Melissa Reinckens, and we also  
16 have Andy Richman from ICE.

17 THE COURT: Okay. Hang on one second.

18 So when we spoke last week, I think it was Friday, I  
19 was advised that -- by the plaintiff that if it concluded that  
20 CME was not entitled to a jury trial and disgorgement, then  
21 this would be a bench trial across the board. So is that  
22 still the case?

23 MR. KUCALA: Your Honor, this is Joe Kucala on behalf  
24 of plaintiff. Yes, your Honor. That is the case. I'll be  
25 honest, it was our understanding that we'd still be proceeding

1 with the August 31st bench trial that was set back in March --

2 THE COURT: Hang on a second. Stop for a second. So  
3 I don't know if it's a bad connection or what. Maybe it's  
4 just that you're on a speakerphone or something. Maybe partly  
5 you're talking really fast. So can you slow it down? I  
6 didn't catch about half of that.

7 MR. KUCALA: Is this better, your Honor?

8 THE COURT: Oh, way better. Thanks.

9 MR. KUCALA: Okay. Sorry about that. Yes, your  
10 Honor. This is Joe Kucala on behalf of CME. So when we spoke  
11 on Friday, it was CME's understanding that, you know, a bench  
12 trial would still be proceeding on August 31st, which was the  
13 date set back in March and hasn't been reset, and we don't see  
14 any reason to delay proceeding --

15 THE COURT: Okay.

16 MR. KUCALA: -- on August 31st. Other than -- other  
17 than that.

18 THE COURT: Yeah, but the more specific question,  
19 though, is that, I mean, the remaining claims or requests for  
20 relief on which there is indisputably a right to a jury trial,  
21 you're foregoing a jury trial on those, correct?

22 MR. KUCALA: Correct, your Honor.

23 THE COURT: Okay. And the defendant has already  
24 advised me that you're foregoing, waiving, whatever you want  
25 to call it, a jury trial on the breach of contract

1 counterclaim, right?

2 MS. DURHAM: That is correct, your Honor.

3 THE COURT: Okay. So this is what we're doing.

4 We're going ahead on August 31st, and it's all going to be by  
5 video. Here's why.

6 So first of all, it's going to go ahead on  
7 August 31st because that is the date that I set back in March.  
8 There is no reason to delay it, particularly if it's going to  
9 be by video. The primary objections have been made to the  
10 data from the defendant, and they have to do with travel  
11 issues, which are now off the table.

12 The reason it's going to be all by video is really  
13 two things. Number one in this order of importance, we've  
14 done a couple of jury trials now. I did a civil jury trial  
15 last week. They went fine. But the fact of the matter is is  
16 that we are potentially putting jurors at risk for their  
17 health coming downtown from the coronavirus.

18 And secondly, we have these recurring issues like we  
19 had this morning where I found out at I think it was 4:41 this  
20 morning that the courthouse was going to be shut down because  
21 of unrest that had taken place in the downtown area last night  
22 and some expectation that it might continue. And this is now  
23 the either third or fourth day that's happened since June.  
24 The others were, to be fair, all clumped in June.

25 But we're subject to those kinds of things happening,

1 which, you know, in the entire time that I have been working  
2 in that courthouse, which has been off and on since 1982, '81,  
3 I guess, it's really not happened before. It would be  
4 extraordinarily disruptive if we had people in here from out  
5 of town or, quite honestly, people in here from in town  
6 because what happened this morning is that a lot of people  
7 were on their way downtown and found out as they got there,  
8 oops, you can't get off the expressway, or, oops, the bridges  
9 are up so you can't get into the loop.

10 So that's the first thing. It's a safety issue both  
11 from the standpoint of coronavirus and then there's a  
12 logistics issue relating to the courthouse.

13 And secondly, I don't say this to minimize the nature  
14 of the dispute at all because it's an important case to both  
15 sides; it's -- well, let's put it this way. I think it's fair  
16 to both sides if everybody's witnesses, assuming it's a bench  
17 trial, all appear in the same way. So that's the way we're  
18 going to do it.

19 What this is going to require is it's going to  
20 require us to do some dry runs, or at least one. So I've got  
21 your list of, you know, who the witnesses are and where  
22 they're going to be appearing from.

23 The rule is going to be -- and this would be the  
24 exact same rule if this was a jury trial or if it was a bench  
25 trial appearing -- or proceeding live or if it's a bench trial

1 by video conference -- that each witness is going to appear  
2 one time. So if somebody, let's say, is called by the  
3 plaintiff adversely, all the questioning by the defendant,  
4 whether it's within the scope of cross or not, is going to be  
5 done all at once, and we're going to get that witness  
6 completely done before we go on to the next witness, the only  
7 exception to that being if there's something that comes up  
8 later in the case that you didn't anticipate and you need to  
9 bring somebody back on to answer that, that would be an  
10 exception.

11 I can't think of any other exceptions, and that one  
12 would be pretty rare in a civil case where people are able to  
13 anticipate the issues in advance and know what they are from  
14 the pretrial order and the discussions surrounding that.

15 So that's the first thing.

16 The second thing is is that on any deposition  
17 testimony, I'm going to want it all in advance. So I should  
18 know, but I haven't committed the status reports to memory, is  
19 all of the deposition testimony that's going to be offered in  
20 lieu of live testimony -- I'm not talking about a deposition  
21 you might use to cross a witness or something like that; I'm  
22 talking about the witnesses who are appearing by deposition --  
23 is all of that live, or is some of that paper depositions?

24 MR. KUCALA: Your Honor, this is Joe Kucala. We have  
25 both written transcripts and video for all the witnesses.

1 THE COURT: Both. Okay.

2 But, I mean, are there some where there's just a  
3 written transcript and no video?

4 MR. KUCALA: Not that I'm aware of, no. Not that I'm  
5 aware of.

6 THE COURT: Okay. All right.

7 MS. DURHAM: No.

8 THE COURT: Ms. Durham, does that sound right to you?

9 MS. DURHAM: That does sound right, your Honor.

10 THE COURT: Okay. So what I'm going to want, and you  
11 can do this in the designation process, I'm going to want all  
12 that stuff -- I'm going to want the hard copies plus, I guess,  
13 the thumb drives with the video on it in advance of the trial.  
14 I'll probably just look at the video, but I want to have the  
15 hard copy as a backup.

16 When you give me -- when I say "hard copy," you're  
17 not actually going to be delivering everything. It's going to  
18 be all, you know, provided in pdfs. The two things I would  
19 say about that is it's okay to do the four to a page. That's  
20 just fine; and just make sure it's one of these little things  
21 that people don't always realize.

22 I'll give you a 20-second lesson about Adobe Acrobat  
23 that you probably already know, but when you save something as  
24 a pdf, the default in Adobe Acrobat is it saves it so it can  
25 be read in every version of Adobe Acrobat that's ever been



1     invented going back to 1.0. What that means is the file ends  
2     up being really huge. So save it as -- you'll see a thing in  
3     the menu that says, Save as other. Click on that, and it will  
4     give you an option to save it as Acrobat 9.0 or greater. Do  
5     that. And that makes the file much smaller.

6             My guess is you're going to need to be sending me  
7     thumb drives because the files are probably going to be too  
8     big to email. They'll get kicked out by our spam filter.

9             So that's on depositions.

10            On -- you should definitely expect that there's going  
11    to be opening statements at the beginning and closing  
12    arguments at the end rather than written submissions. Don't  
13    assume that there's going to be trial briefs. Assume that  
14    there won't be. I might change that in a game-time decision  
15    depending upon how things go, but assume that there's not  
16    going to be trial briefs and you're going to be doing openings  
17    and closings.

18            In terms of the dry run, we don't use Zoom. I won't  
19    give you the long version of that. It's just it is what it  
20    is. And so there's going to be a limitation on the number of  
21    people who can be on video at any one time. I'm pretty sure  
22    that I'm going to be limiting it to the witness, the lawyers  
23    questioning the witness, and the court reporter is going to  
24    have to be on video. I might broaden that to two lawyers per  
25    witness, but don't assume that. Obviously, it doesn't have to

1 be the same lawyer for every person. Of course not.

2 And other people will be able to -- on the platform  
3 we're using, other people will certainly be able to listen in  
4 by a phone connection. Less clear whether they'll be able to  
5 observe. That's something we'll work out in our dry run.

6 My intention is to sit on the bench in the courtroom  
7 and run it through my courtroom desktop, which I also will  
8 project onto the courtroom evidence presentation system. So  
9 it will be a public trial to that extent that anybody wants to  
10 watch it, can come sit in the courtroom and watch and hear  
11 everything that's presented by way of argument and testimony.

12 And that can also be true for anybody that -- you  
13 know, who is associated with either side that wants to watch  
14 everything and, you know, can't necessarily, you know, maybe  
15 gets kicked out from a numbers standpoint and can't join in on  
16 the video.

17 And then the last thing I would say is that one of  
18 the things that I suspect that you, like I have learned in the  
19 last four months, is that a lot of people's home Internet  
20 connection stinks. So my advice to anybody who is going to be  
21 questioning or testifying is tell them it's time to call their  
22 ISP and upgrade a little bit, pay the extra 10 bucks a month,  
23 or make sure that they're going -- I mean, I have had a couple  
24 of evidentiary proceedings where people have gone to like a  
25 lawyer's office or something like that. Just make sure there

1 is a good connection there.

2 And then I'd like to set up a date maybe next week  
3 sometime -- yeah, next week sometime where we're going to do  
4 some testing. My proposal would be Monday. No. Yeah, Monday  
5 afternoon of next week. That's the 17th. So maybe something  
6 like 2:00 in the afternoon.

7 I think the idea would be let's have -- I'll send out  
8 a video invite in advance for the platform we'll be using. I  
9 think the idea would be to have, you know -- to have, let's  
10 say, a couple people on the, let's say -- let's just do the  
11 numbers game here.

12 The platform we're going to be using is something  
13 called Microsoft Teams. So if you have -- if you've  
14 downloaded the app for Teams and you have either a laptop or a  
15 desktop, you can see nine people, including yourself. I can't  
16 see more than that. It's just a flaw in the -- it's just a --  
17 I can see everybody but not all at once.

18 I think the idea would be we have three people  
19 participating in this test from each side, two of whom are  
20 going to play lawyer, and one of whom is going to play  
21 witness. Because one of the things we're going to want to do  
22 is just kind of walk through dealing with exhibits.

23 So, you know, screen sharing is an option for use of  
24 exhibits but frankly not a terrific one because on most of  
25 these things when somebody shares their screen, that's all you

1 see and you don't see the witness anymore. You don't see the  
2 person who is talking anymore.

3           So I think the better option for that is that -- and  
4 this is -- you know, it's a little bit more cumbersome, it's  
5 just part of the facts, facts on the ground, so to speak -- is  
6 that you're going to have to have -- if you're going to use  
7 exhibits with a witness, even if it's the person's deposition,  
8 they're going to have to have hard copies in their hand at the  
9 time they start to testify. It doesn't mean you have to give  
10 it to them a week advance, it doesn't mean you have to give it  
11 to them even four days or three days or two days in advance,  
12 but they have to have them in their hands when they are  
13 testifying.

14           And this is going to be easy for the party that's  
15 affiliated with the witness. It's going to be harder for the  
16 other party, A, because you don't want to do it because you're  
17 lawyer and you don't want to give up your -- what you're going  
18 to go through. Too bad is my answer to that.

19           And secondly, it's just -- you're going to have to  
20 get stuff to people in advance and have it organized in a way  
21 that they can find it easy. That doesn't mean you have to put  
22 it in the sequence in which you're going to question about it,  
23 but you're going to need to be giving people probably some  
24 kind of a binder that has stuff tabbed in it instead of old  
25 school that way.

1 I would urge against trying to do it all  
2 electronically because part of what we're trying to guard  
3 against here is what happens if the electronics aren't working  
4 properly.

5 That's pretty much all the stuff that I can think of  
6 to talk about today before we do a dry run.

7 So I am going to turn it over for questions. First  
8 to plaintiff.

9 MR. KUCALA: Thanks, your Honor. This is Joe Kucala.  
10 Do you think -- you're going to do an invite on Monday  
11 afternoon, so that would be fine on a dry run.

12 Have you used this platform before?

13 THE COURT: Yeah, I've used it for a bunch of stuff.

14 MR. KUCALA: Okay. And are there any  
15 particular resources that we should --

16 THE COURT: We've used it for a bunch of stuff.

17 No, it's actually pretty intuitive. The one thing I  
18 would advise is download the app. So you can get it -- so  
19 you'll get an invite from me. You can just click on that, and  
20 it goes into a web version of it, though on the web version of  
21 it, you don't have as much versatility as to how many people  
22 you can see on the screen at once.

23 So I would download the app. And it's not some sort  
24 of a -- you know, a North Korean application or anything like  
25 that that's going to steal all of your secrets or anything.

1 It's Microsoft, so it's --

2 MR. KUCALA: Yeah, we definitely have used Teams in  
3 some other straightforward video conference situations like  
4 that. So I was just wondering if --

5 THE COURT: Yeah, we have another one that we use --  
6 we've had another one that we use, which is a Cisco program,  
7 but in my -- I've used both of them a lot, and I think this  
8 one is a little bit better.

9 MR. KUCALA: Okay. And then just in the context of a  
10 bench trial, are there other issues or ways to present  
11 information that would be helpful to you? I know you said no  
12 trial briefs or something like that, but the parties are  
13 thinking about doing stipulations of fact that we'll include  
14 in the pretrial order. I'm just wondering if there's any  
15 other --

16 THE COURT: Yeah, that would be great. That would be  
17 great. I mean, I will -- I mean, my supposition is that, you  
18 know, you're going to be using slides in your opening and  
19 closing, and, again, this is going to be harder to do by  
20 video.

21 I mean, you can do it. I mean, you could share your  
22 screen, and I could just listen to you and look at your  
23 slides, but -- you know, maybe some people prefer that. I  
24 don't know. Don't look at me, look at my slides.

25 But you're probably going to want to give me, you

1 know, the deck in advance. And it doesn't have to be way in  
2 advance. I just have to have it in my hands beforehand.

3 Now, giving stuff to me is just going to be doing it  
4 all electronically. What I said before about getting the hard  
5 copies in the witnesses' hands, that's really about the  
6 witnesses.

7 MR. KUCALA: Okay. Is there any objection to at  
8 least the lawyers and maybe one of the clients all operating  
9 from a single conference room that has cameras and video and  
10 audio?

11 THE COURT: How much social distancing you do is up  
12 to you. I can control it when it's in the courtroom. I am  
13 not going to try when it's not.

14 MR. KUCALA: Understood.

15 THE COURT: So the one issue, though, that I will  
16 tell you that sometimes happens on video conferencing  
17 platforms is if -- so I had one once. I did a preliminary  
18 injunction hearing back in April in a case involving a Cook  
19 County jail, and there was one side who was set up in a  
20 conference room and had me on a speakerphone as opposed to  
21 listening to it through the computer, and we got some pretty  
22 God-awful feedback.

23 Now, usually the remedy for that is you just tell  
24 everybody in advance mute yourself and only unmute yourself  
25 when you're talking.

1           One of the downsides of this particular platform and  
2 the other ones that we've used at the court is that I can't  
3 unmute somebody, so they got to kind of do it themselves.

4           So that's the only issue that occurs to me off the  
5 top of my head with, you know, multiple people in one room.

6           MR. KUCALA: Understood.

7           I think that's it from me. Thank you, your Honor.

8           THE COURT: Okay. Any questions or points on the  
9 defense side?

10          MS. DURHAM: Yes, your Honor. And we appreciate the  
11 dry run being scheduled for next week. But I'm just  
12 wondering, if we feel like we need sort of additional dry runs  
13 or getting comfortable with the system, will that be possible?

14          THE COURT: Yeah. That's why I'm doing this next  
15 week and not the week before the trial.

16          MS. DURHAM: Okay. Thank you, your Honor.

17          THE COURT: Figure out if there's bugs. If there's  
18 bugs, we'll get them sorted out.

19          MS. DURHAM: Okay. And I did have one other question  
20 or clarification, although it doesn't relate specifically to  
21 the video trial issue.

22          THE COURT: Okay. Go ahead.

23          MS. DURHAM: In your order of this morning, you  
24 mentioned that the counterfeiting claim had been decided on  
25 liability and only damages. Is that --



1 THE COURT: That was a mistake. Sorry.

2 MS. DURHAM: Okay. Thank you, your Honor.

3 THE COURT: Yeah. Anything else from the defense?

4 MS. DURHAM: I think that covers it, your Honor.

5 Thank you.

6 THE COURT: Okay. So here's -- so I'm going to -- so  
7 the key on this -- the key on the video invite I'm going to  
8 send you is that one person cannot open it in two different  
9 locations. In other words, if I send, just for example, a  
10 video invite to Mr. Kucala and he basically says, oh, okay,  
11 well, I can open it on my desktop or my laptop and I can have  
12 the person I'm going to have act as a witness open it on an  
13 iPad, the answer is, no, it won't work. It only will open one  
14 place.

15 So what I'm going to do -- what I'd like to do is  
16 send the invite to three different email addresses on each  
17 side. And so let's just kind of figure out who those are  
18 going to be right now. And then -- and whoever I send it to  
19 can forward it to somebody. The whole point is you can't have  
20 two people going off of an invite that sends the same email  
21 address.

22 So what I propose to do would be to send it on the  
23 plaintiff's side to Mr. Kucala, Mr. Norvell, and let's say  
24 Mr. Kelly, because I'm looking at the docket and I've got  
25 their email addresses. And on the defense side, send it to

1 Mr. Durham -- or Ms. Durham, Mr. Taufer, and I'm not sure -- I  
2 know I've heard Mr. Schwartzman's name a lot. Maybe he is the  
3 third person. You tell me.

4 MS. DURHAM: Yes, your Honor, this is Gina Durham.  
5 That would be -- that would be good.

6 THE COURT: All right. That's what I'll do then.

7 MS. DURHAM: And, your Honor, I did think of one  
8 additional question, if I may?

9 THE COURT: Yeah.

10 MS. DURHAM: I just want a clarification. In terms  
11 of trial days, do you expect it to go consecutively, and would  
12 it be your normal trial day?

13 THE COURT: That is a wonderful question. That's a  
14 wonderful question, which is a prelude to saying I'm not sure.

15 So I'm just going to tell you, having done a whole  
16 bunch of video stuff, including a couple of hearings on a  
17 judicial panel of multi-district litigation, they are more  
18 taxing. I think they're more taxing. Not a lot.

19 Maybe rather than going from 9:00 to 5:00, we'll go  
20 from like 10:00 to 4:00 or something like that. But that's  
21 something I haven't figured out yet, to be honest.

22 MS. DURHAM: Okay.

23 THE COURT: Okay. Great. So be looking for this  
24 video invite from me which I'll send out later in the week.

25 Have a good day. Take care.

1 MR. KUCALA: Thanks a lot.

2 MS. DURHAM: Thank you, your Honor.

3 (Which were all the proceedings had in the above-entitled  
4 cause on the day and date aforesaid.)

5 I certify that the foregoing is a correct transcript from  
6 the record of proceedings in the above-entitled matter.

7 Carolyn R. Cox \_\_\_\_\_ Date \_\_\_\_\_  
8 Official Court Reporter  
9 Northern District of Illinois  
10 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR  
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